IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1663

New York State Teamsters Conference Pension and Retirement Fund, et al., *Petitioners*

v.

Pension Benefit Guaranty Corporation, and Brewery Workers Pension Fund, et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

CASES: Page

Page

STATUTES:

MISCELLANEOUS:

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NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL., *Petitioners*[1]

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 10, 1979.

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[1] The caption includes the following appellant trustees of the Teamsters Fund who similarly file this petition for certiorari: Rocco DePerno, Stanley Clayton, Irving Wisch, Lyle Dixon, Kepler Vincent, Victor Mousseau, Paul Bush, and Charles H. Mosley, Sr., administrator.

OPINIONS BELOW

The opinion of the Court of Appeals and the memorandum opinion of the United States District Court appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 10, 1979. A timely Petition for Reconsideration and Suggestion that the Case Be Heard En Banc was denied on February 27, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Employment Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*), hereinafter "ERISA" or "the Act" is a comprehensive federal statute regulating private pensions and other employee benefit programs. Sections 208 and 1015(1) (29 U.S.C. 1058 and 26 U.S.C. 414(l)) prohibit a merger of pension funds which result in the dilution of pension benefits.[2] Section 514 of the Act (29 U.S.C. 1144) provides for preemption of all state laws relating to any employee benefit plan with the exception of any "cause of action which arose, or any act or omission which occurred before January, 1975." The questions presented are:

[2] In essence, the merger of two pension plans is prohibited unless each participant would be entitled to receive a benefit "immediately after the merger . . . equal to or greater than the benefit he would have been entitled to receive immediately before the merger." The restriction applies to multiemployer plans only to the extent determined by the PBGC. Sections 208 and 1015(1).

(1) Whether a pre-ERISA execution and repudiation of a merger agreement gave rise to a cause of action within the meaning of § 514(b)1) precluding application of ERISA, notwithstanding that an express condition of the merger agreement, IRS approval, and the actual merger, the statutory event, could only and did take place more than two years subsequent to the effective date of ERISA.

(2) Whether the Court of Appeals in reaching its decision holding ERISA inapplicable to the merger agreement, improperly invoked and misapplied principles of anticipatory breach of contract, and thereby decided an important federal question in a way in conflict with decisions of this Court.

(3) Whether the lower court improperly denied application of the statutory protections of §§ 208 and 1015(1) on the ground that it would be "anomalous" to hold that state law governed the respondent's cause of action to force steps preliminary to the actual merger while ERISA controlled subsequent action to bring the merger to fruition.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

§ 414. Definition and Special Rules

(l) Mergers And Consolidations Of Plans Or Transfers Of Plan Assets.—A trust which forms a part of a plan shall not constitute a qualified trust under section 401 and a plan shall be treated as not described in section 403(a) or 405 unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after the date of the enactment of the Employee

Retirement Income Security Act of 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corporation. (ERISA, Section 1015)

United States Code, Title 29:

§ 1058. Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with or transfer its assets or liabilities to any other plan after the date of enactment of this Act [Sept. 2, 1974], unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corp. (ERISA, Section 208)

§ 1132. Civil enforcement

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section. (ERISA, Section 502)

§ 1144. Effect on other laws

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not aply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975. (ERISA, Section 514)

STATEMENT OF THE CASE[3]

On January 19, 1977 the Teamsters Fund filed this action in U.S. District Court for the District of Columbia seeking a declaration that §§ 208 and 1015(l) are applicable to mergers involving multiemployer plans, and a mandatory injunction directing the PBGC to assert jurisdiction over the imminent merger, and to determine whether it should be prohibited pursuant to the criteria set forth in §§ 208 and 1015(l).

The jurisdiction of the District Court was invoked pursuant to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), specifically §§ 502(a)(3) and 4003(f) (29 U.S.C. 1132(a)(3) and 1303

[3] Unless otherwise noted, facts stated herein are derived from Appellant's Statement of Material Facts About Which there is No Genuine Issue (and uncontested supporting affidavits) filed in support of their Motion for Summary Judgment below. All references to the Appendix refer to the Appendix filed with the Court of Appeals.

(f), and the Administrative Procedure Act (5 U.S.C. 702).[4]

Petitioners New York State Teamsters Conference Pension and Retirement Fund (hereinafter "Teamsters Fund") is a multiemployer pension trust established pursuant to collective bargaining agreements between 13 different local unions in New York State and approximately 1,200 employers. Its principal office is located in Utica, New York. It has more than 25,000 participants and beneficiaries and holds assets in excess of $100,000,000.

Respondent Brewery Workers Pension Fund (hereinafter "Brewery Fund"), with a principal office in New York City, is also a multiemployer pension trust established pursuant to collective bargaining agreements. In August 1973 twenty-four employers contributed to the Brewery Fund on behalf of approximately 3,500 participating employees who belonged to two different locals. At that time the Brewery Fund held assets valued at approximately $30,000,000. Its liabilities are in excess of $70,000,000 (not including liability for benefits to retirees). Its assets are continually declining and the Fund currently operates at a loss of approximately $400,000 per month.

Respondent Pension Benefit Guaranty Corporation, hereinafter "PBGC" is a government corporation established by § 4002 of ERISA (29 U.S.C. 1302). Its principal function is to protect participants and beneficiaries from loss of benefits resulting from involuntary pension plan terminations through administration

[4] The Administrative Procedure Act is expressly made applicable to agency action pursuant to § 507 of the Act (29 U.S.C. 1137).

of a system of benefit insurance. Congress has charged the corporation to investigate mergers of multiemployer pension funds to make determinations as to whether particular mergers may take place. 29 U.S.C. 1058, 26 U.S.C. 414(1) (ERISA, Sections 208 and 1015(1).

On August 7, 1973, petitioners Teamsters Fund and respondents Brewery Fund entered into an "Agreement" and "Plan of Integration" to merge the Brewery Fund into the Teamsters Fund. Appendix, p. 70. The Agreement was expressly conditioned upon: (a) ratification of the merger agreement by the employees participating in the Brewery Fund and (b) approval by the IRS that the merger complied with the applicable provisions of the Internal Revenue Code relative to continued tax qualifications. Under the terms of the Agreement, the merger was to be consummated 30 days after the parties were informed that a merger application was approved by the IRS. Appendix, pp. 76-78, 79. In November of 1973 the participants in the Brewery Fund approved the merger agreement by mail ballot. The merger agreement was not submitted to the participants of the Teamsters Fund for approval.

On January 5, 1974, six months after the merger agreement was executed but before any transmission to the IRS was made, Rheingold Breweries, which was one of the two largest contributing employers to the Brewery Fund, announced that it intended to close its operations. Rheingold closed its New York brewery on February 1, 1974. The closing and loss of 1,500 employees for whom contributions would no longer be made impaired the actuarial solvency of the merger and would require a substantial reduction in pension

benefits for participants in the Teamsters Fund.[5] Thereupon, on February 15, 1974, the Teamsters Fund voted not to proceed with the proposed merger.

On May 24, 1974 the Brewery Workers filed suit in the Supreme Court of the State of New York (Queens County) to obtain specific performance of the merger agreement. The Teamsters defended against this suit on the ground that the curtailment of operations at Rheingold was a material change of conditions excusing performance of the merger agreement. On April 29, 1975 the New York Supreme Court granted summary judgment and specifically ordered the Teamsters Fund to carry out the terms of the merger agreement by executing those documents necessary to request approval of the merger from the IRS.[6] The Court's decision was founded exclusively upon common law contract principles. Appeals to the Appellate Division and the Court of Appeals proved unavailing. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund,* 49 A.D.2d 755, 374 N.Y.S.2d 590 (App.Div.2d Dept., 1975); leave

[5] The Brewery Fund's bleak economic condition was made worse when Schaeffer, the largest brewery in New York City, also closed its doors. Together Rheingold and Schaeffer had been responsible for 82% of the annual contributions made by all employers in the Brewery Workers Fund. The merger would create an unfunded liability in excess of $70,000,000 which would have to be borne by the Teamsters Fund. While the closing of Schaeffer occurred subsequent to the filing of the complaint and was not embraced in the N.Y. State Court litigation, it was a prominent circumstance brought to the attention of the PBGC in support of the request that PBGC exercise its jurisdiction in connection with the then pending merger. *See* p. 9 *infra.*

[6] The Court did not—and could not—direct that a merger take place because, under the terms of the merger agreement, the merger itself was conditioned upon IRS approval.

to appeal to the New York Court of Appeals was denied the Teamsters Fund in February of 1976. 38 N.Y. 2d 709, 382 N.Y.S.2d 1028, 346 N.E.2d 558 (1976). The effect of ERISA, which was enacted in September 1974 while the suit was pending before the New York Court, was neither litigated nor decided by the New York courts.

On March 24, 1976, the Teamsters Fund petitioned the PBGC to assert jurisdiction and to evaluate its propriety under § 208 criteria to determine whether the merger should be prohibited.[7] PBGC refused to assert jurisdiction. Appendix, p. 94. The grounds for the PBGC's refusal were (a) Section 208 is not effective with respect to mergers involving multiemployer plans until such time as the PBGC issues regulations of general applicability; and (b) ERISA is not applicable in any event because the merger would be the result of a "cause of action" which arose prior to ERISA's effective date and is thereby exempted by 514(b)(1) of the Act.

On March 29, 1976, the Brewery Fund for the first time applied to the IRS for an approval of the merger. The application was made unilaterally and without notice to the Teamsters Fund and the Teamsters participants and beneficiaries as required by ERISA.[8] The application gave no indication that there were serious

[7] Section 208 contains the substantive rules governing mergers of private pension plans. Section 1015(1) provides that a trust maintained under a pension plan must abide by the merger rules in order to acquire and maintain favorable tax treatment (Court of Appeals Slip Opin. at 4, note 3).

[8] Appendix, pp. 95-102; ERISA, § 3001(a), (29 U.S.C. § 1201 (a); I.R.S. Reg. § 11.7476-2 (26 C.F.R. § 11.7476-2); and Rev. Proc. 75-33.

objections to the merger or that the merger would have an adverse impact on the participants and beneficiaries of the Teamsters Fund. One year and eleven months after ERISA had become effective (November, 1976), the merger was approved by the IRS. On October 6, 1978 the IRS remanded the application to the regional office for reconsideration on the ground that the Brewery Fund violated ERISA in failing to give notice of its application to interested parties. (ERISA, Section 3001(a); § 11.7476-2(a) of the temporary regulations; § 1.7476-1 of the final regulations). The matter of IRS approval is still pending.

On April 13, 1977, Respondent Brewery Fund obtained a supplemental order from the New York Supreme Court which declared that the Teamsters and Brewery Funds were merged as of December 31, 1976 and directing the Teamsters Fund to receive all assets of the Brewery Fund and to assume all liability and responsibilities for the Brewery Fund. Appendix, p. 110. The State Court totally ignored Petitioner's argument that ERISA had ousted it of jurisdiction over the merger.

On May 22, 1977 the Brewery Fund moved to have Plaintiff Trustees adjudged in contempt for refusing to proceed with the merger as directed by the New York Supreme Court's supplemental order. On August 19, 1977 Petitioners were adjudged in contempt of the supplemental order and fined the maximum amount permitted by the statute. Having no other options available to them, Petitioners have merged the two Funds rather than suffer penalties for contempt of the New York supplemental order. However, under the guidance of Petitioner's actuaries and consultants, the assets and records of the Brewery Fund are being held and administered separately so that the merger may be dissolved

and assets and liabilities be retransferred to the Brewery Fund pending disposition of judicial proceedings.

On August 22, 1977 the District Court dismissed the Teamsters complaint and granted summary judgment in favor of the PBGC and the Brewery Fund. The court ruled that the New York State court decision respecting the validity and enforceability of the merger agreement was res judicata as to the instant action, and as an additional ground held that application of ERISA would be impermissibly retroactive. In a decision dated January 10, 1979, a division of the Court of Appeals for the District of Columbia Circuit affirmed the District Court's judgment. On February 27, 1979, the Court of Appeals denied the Petition for Reconsideration and Suggestion that the Case be Heard En Banc. The opinion of the Court of Appeals is fully discussed in subsequent sections of this Petition under the heading of Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

I. The Court's Opinion Denying Application of ERISA to the Merger Had a Devastating Impact on the Pension Benefits of 25,000 Teamsters Fund Participants.

The United States District Court granted a motion for summary judgment in favor of respondents Brewery Fund and PBGC based, in part, on its conclusion that "ERISA had no retroactive effect and thus could not be applied where an agreement, and a mature cause of action based thereupon, pre-dated the Act's adoption." Slip Opin. at 6. The Court of Appeals affirmed the judgment of the United States District Court, not on any rationale adopted by that court, but instead on a *sua sponte* application of the doctrine of anticipatory breach, to which it gave decisive weight. The court also

concluded, as a basis for denying the application of ERISA, that allowing state law to govern the contract to merge while ERISA controlled the merger itself would produce an anomalous result, contrary to congressional policy.[9]

Involved here is a highly improvident merger which, if allowed to stand, will require the Teamsters to fund an additional $70,000,000 or more on behalf of the insolvent Brewery Fund. The absorption of this massive liability will require a substantial reduction in the benefits of 25,000 Teamsters Fund participants or the termination of the Teamsters plan itself. This is precisely the situation which §§ 208 and 1015(1) of ERISA were designed to prevent. This Court is therefore called upon to determine whether the participants of the Teamsters Fund were improperly denied the protection of ERISA.

[9] The District Court, in granting summary judgment, principally relied on res judicata, holding that the New York courts could have entertained the issue. The Court of Appeals discussed this issue, but did not resolve it. Neither did the District Court nor the Court of Appeals pass on the principal reason for PBGC's refusal to assert jurisdiction, i.e., that the PBGC had not yet drafted regulations to make §§ 208 and 1015(1) of the Act operational over multi employer plans.

The court in its decision (fn 1, Slip Opin. at 3), stated that the necessary ruling from the IRS was not obtained until September, 1976 because of the Teamsters' recalcitrance in providing necessary documentation. There is no support for this surmise in the uncontested facts. Indeed, the Brewery Workers do not contend that they sought to obtain IRS approval prior to March 9, 1976. Since the court reached its opinion and judgment on the express assumption that the Teamsters' refusal to assist in preparation for the merger was not a breach of the merger agreement (Slip Op. at 9), the question is not in issue and need not be further discussed.

II. The Court, in Failing to Hold That the Merger Agreement Was Governed by ERISA, Decided an Important Federal Question in a Way Which Conflicted With Applicable Decisions of This Court.

Sections 208 and 1015(1) are concerned essentially with the substantive provisions of merger agreements sought to be implemented post-ERISA. They are not concerned with the common law validity of such agreements. These are matters traditionally controlled by state law. That jurisdiction is in no way touched upon by ERISA. In this case, the requirements and protections of ERISA only became significant after the validity of the common law contract to merge was established by the state courts. ERISA jurisdiction over the instant merger was not triggered until the IRS approved the merger, which approval occurred post-ERISA, and when a subsequent order of the New York State Court directed the merger and the concomitant transfer of assets and liabilities. The application of §§ 208 and 1015(1) to the instant merger agreement, therefore, would have been entirely prospective and not retroactive in any respect.

Agreements between private parties may not be implemented in any way which conflicts with the execution of Congressional policy. When Congress, in the exercise of its regulatory authority, preempts an area, and, in doing so, sets forth a regulatory scheme, federal courts are:

> . . . not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its [Congress'] policy, as such a restriction would place the regulation of interstate commerce in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discern-

> ment to bring within the range of their agreements.

Sproles v. *Binford,* 286 U.S. 374, 390-391 (1932).

No contract between private parties which is entered into prior to the enactment of comprehensive, specific and preemptive federal legislation can be enforced subsequent to enactment of a comprehensive regulatory scheme if such enforcement would result in frustration of the express will of the legislature. *Sproles* v. *Binford,* 286 U.S. 374, 390-391 (1932) (contracts relating to the use of the highways are deemed to have been made in contemplation of the regulatory authority of the State); *Fleming* v. *Rhodes,* 331 U.S. 100, 197 (1947) (rights acquired by valid judgments are also subject to subsequent federal legislation); *Louisville & Nashville R. Co.* v. *Mottley,* 219 U.S. 467, 482 (1911) (contract to provide free rail transportation made unenforceable by subsequent federal legislation); *S.E.C.* v. *Chenery Corporation,* 332 U.S. 194, 203 (1947) (S.E.C. ruling operates to deny effectiveness to corporate reorganization plan previously lawful); *Manigault* v. *Springs,* 199 U.S. 473, 480 (1905) (state interests to construct a dam override previously existing contract of landowners to the contrary); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 357 (1908) (landowners' contract to divert water made unlawful by subsequent state legislation); *Chicago B & O Railroad Co.* v. *McGuire,* 219 U.S. 567 (1911) (contractual settlement cannot bar action for damages based on subsequent legislation); *Atlantic Coast Line Railroad Co.* v. *Goldsboro,* 232 U.S. 548, 558 (1914) (contract between railroad and town granting right of way can be modified by subsequent municipal ordinances); *Condor Operating Co.* v. *Sawhill,* 514 F.2d 351, 361 (Emer. App. 1975) (F.E.A. regulation can validly modify existing supplier/purchaser contractual relationships); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.,* 159 F.2d 306 (4th Cir. 1947) (preexisting pooling contract between carriers made unlawful by amendments to Interstate Commerce Act); *Switchmens' Union of North America* v. *National Mediation Board,* 135 F.2d 785 (D.C.Cir. 1943), *rev'd on other grounds,* 320 U.S. 297 (1943) (National Mediation Board unit determination can invalidate preexisting collective bargaining contracts). As the Supreme Court stated in *Louisville & Nashville R. Co.* v. *Mottley,* 219 U.S. 467, 482 (1911):

> . . . contracts must be understood as made in reference to the possible exercise of the rightful authority of the governments, and *no obligation of a contract can extend to the defeat of legitimate government authority.* (Emphasis added)

In *Louisville & Nashville R. Co.* v. *Mottley, supra.,* a case remarkably similar to the one at bar, plaintiffs had agreed to settle a personal injury claim against defendant railroad in consideration of lifetime passes. Subsequent to the settlement agreement, Congress enacted a statute precluding the granting or use of such passes. When the railroad refused to continue honoring the passes, plaintiffs sought specific enforcement of the agreement. Ruling for the defendant railroad, the Supreme Court noted, at 219 U.S. 485-486:

> . . . as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts

> between themselves, in anticipation of legislation render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted.

Savings clauses such as 514(b)(1) are traditionally treated as a Congressional statement that the act construed not be applied retroactively to deprive one of fully vested rights. *Fleming* v. *Rhodes, supra; Louisville and Nashville R. Co.* v. *Mottley, supra; Brewing Corp. of America* v. *Cleveland Trust Co.,* 185 F.2d 482 (6th Cir. 1950).[10]

Similarly, courts which have construed § 514(b)(1) have treated that section as nothing more than a declaration that ERISA cannot be applied retroactively. *Martin* v. *Bankers Trust,* 417 F. Supp. 923 (W.D.Va. 1976); *Nolan* v. *Meyer,* 520 F.2d 1276 (2d Cir. 1975), *cert. denied,* 423 U.S. 1034 (1975); *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 (1978); *Keller* v. *Graphic Systems,* 422 F. Supp. 1005 (N.D. Ohio 1976); *Reuther* v. *Trustees of Trucking,* 575 F.2d 1074 (3d Cir. 1978); *Wong* v. *Bacon,* 445 F. Supp. 1189 (N.D. Cal. 1978).

It is equally well established that, for the purposes of § 514(b)(1) or similar savings clauses, a preexisting

[10] Respondents sought below to distinguish *Fleming, supra,* as well as *Mottley, supra,* and other cases cited here by arguing that these cases did not involve statutes which contained a provision comparable to § 514(b)(1) exempting pre-existing causes of action. *Fleming* and cases following did contain a § 514(b)(1) type clause. Despite the presence of such provisions, the courts found, in factual contexts nearly identical to the case at bar, that the application of newly enacted statutes was neither retroactive nor barred by the savings clause of the statute. *Fleming, supra; Brewing Corp. of America, supra.*

cause of action which would take the controversy outside of the preemptive statute exists only when there is a mature cause of action in which every significant condition to the action has occurred prior to the enactment of the federal preemptive statute. *See Martin* v. *Bankers Trust Co., supra; Nolan* v. *Meyer, supra.* Conversely, when a critical condition to the cause of action does not occur until after an enactment of the preemptive statute, or when the specific event addressed by the statute does not occur until after enactment, there is no pre-existing cause of action and the matter is governed by the intervening Federal law. *See Fleming* v. *Rhodes, supra; Don't Tear It Down* v. *Washington,* 339 F. Supp. 153 (D.D.C. 1975).[11]

It is submitted that the decisions reviewed here are controlling. Accordingly, the lower court in reliance on these authorities should have directed the PBGC to assert its authority over the merger to protect the Teamsters participants. The court failed to do so. As a consequence, the pension benefits of more than 25,000 Teamster participants will be significantly reduced. Indeed, the continued existence of the plan itself has been seriously jeopardized. A grant of certiorari is required.

III. The Doctrine of Anticipatory Breach Was Improperly Invoked and Seriously Misapplied to Eliminate IRS Approval as a Basis for ERISA Jurisdiction.

The Court of Appeals did not affirm the grant of summary judgment on the theory relied on by the District Court: that application of ERISA to the merger

[11] In the *Don't Tear It Down* case, a Superior Court order permitted demolition of the Willard Hotel was superseded by the subsequent enactment of the Pennsylvania Development Act.

of the Teamsters and Brewery Funds would be impermissibly retroactive. Rather, it ***sua sponte*** applied the doctrine of anticipatory breach.

While IRS approval, an express condition of the merger contract, occurred post-ERISA, the court, contrary to established law, would not permit such fact to trigger PBGC jurisdiction. The court instead held that the repudiation of the agreement was an anticipatory breach which eliminated IRS approval as a precondition to the merger. In this process, the court implicitly recognized that a pre-ERISA merger agreement could not be implemented post-ERISA except in compliance with §§ 208 and 1015(l). However, solely because of the pre-ERISA repudiation of the merger agreement, IRS approval was deemed forfeited. Through this unprecedented and novel doctrine, apparently based on perceived equities between the parties, the court limited the application of a significant federal statutory protection against an improvident merger.

The Court of Appeals cited only the Restatement (Second) of Contracts, § 277 (1) comment b (Tent. Draft 1974) in support of its conclusion that the:

> "Teamsters Fund's repudiation of its agreement with the Brewery Fund was an anticipatory breach thereof, and ***effectively eliminated IRS approval as a precondition to a suit by the Brewery Fund to enforce specifically the agreement's terms.***" (Emphasis added)

Slip Opin. at 10.

Concededly, in the event of the total repudiation of a contract where damages only are sought, the aggrieved party should not be required to perform a useless act, even though it may be an express condition of the contract. 5 Williston, Contracts § 699 p. 344. However, where specific performance is sought as distinguished from damages, no condition necessary to performance may be excused since such is the essence of specific performance. The court, moreover, failed to observe that a condition which can not be fulfilled in any event discharges both parties to a contract, even if an anticipatory breach occurs. Restatement (Second) of Contracts, § 278 (Tent. Draft 1974).

Disapproval of the merger by the IRS would automatically render the agreement null and void, in accordance with the express agreement of the parties, as well as by operation of law. IRS approval in an action for specific performance could ***not*** be eliminated because of an anticipatory repudiation of the agreement. Indeed, fulfillment of the condition of IRS approval was absolutely necessary to bring the merger to fruition. 5A Corbin on Contracts, § 1141, p. 713.[12]

Finally, the court failed to perceive that conditions which may be eliminated or excused under appropriate circumstances are those which do not involve statutory requirements or the approval of a public agency. Restatement (Second) of Contracts, § 278 (Tent. Draft 1974). The public interest requiring compliance with statutory conditions may not be eliminated where specific performance is sought because of an underlying

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[12] There is no way in which specific performance to compel the merger could take place without IRS approval since such approval is necessary to obtain tax qualification. Surely the Court would not have compelled a merger if IRS disapproved it. Tax qualification is the foundation of a contributory pension program. Indeed, it was an express condition of the contract. The Court's view, therefore, that the breach of contract eliminated IRS approval as a condition for specific performance is puzzling.

breach of contract, anticipatory or otherwise. Indeed, there is no rational relationship between a breach of an agreement and the public interest in achieving a statutory standard where performance of the agreement is compelled.

A state court, in enforcing a contract, may require preliminary steps to be undertaken. It may *not*, however, eliminate the statutory condition enacted to protect the public interest in the performance of the agreement. ***Watson Bros. Transp. Co.*** v. ***Jaffa,*** 143 F.2d 340 (8th Cir. 1944); 5A Corbin on Contracts, § 1141, p. 713; ***Franko*** v. ***Olszewski,*** 25 N.W.2d 593 (1947); ***Kaneko*** v. ***Okudo,*** 15 Cal. Rptr. 792, 195 Cal. App. 2d 217 (1961); ***Bidwell*** v. ***Long,*** 218 N.Y.S.2d 108, 14 A.D.2d 168 (1961).

It must be concluded that the Court of Appeal's unprecedented reliance on the doctrine of anticipatory breach as a basis for avoiding application of ERISA or any other preemptive federal protective statutes is unsupportable. That doctrine does not furnish any justification for ignoring the controlling authorities reviewed in Section 2 of this petition. The court's error significantly diminished ERISA jurisdiction and unfairly deprived more than 25,000 participants of the protection of the merger provisions of that statute. Such an egregrious misapplication of law deserves review by this Court.

IV. It Is Not Anomalous But Consistent With the Purposes of the Statute for State Law to Compel Steps Preliminary to the Merger While Provisions of ERISA Control the Substantive Terms of the Merger.

The court refused to apply ERISA even though it expressly recognized that the Brewery Fund could

not compel a final merger prior to obtaining IRS approval. To do so, the court opined:

> "would produce the anomalous result that state law governed the Brewery Workers' cause of action to force the Fund to proceed with steps preliminary to the actual merger while the provisions of ERISA controlled any subsequent action to bring the matter to fruition—the exact situation the preemption and savings provisions of § 514 of ERISA were designed to avoid."

Slip Opin. at 10, 11.

We submit that this holding is an egregious misapplication of the statute. While a state cause of action may have occurred prior to the enactment of ERISA, the court failed to fully recognize that there is a fundamental distinction between an action for specific performance relating to the validity of the merger agreement and agency action measuring the merger against the standards set forth in ERISA. Enforcement of the ERISA merger criteria is vested exclusively with the PBGC and the federal courts. Yet, the lower court, under the guise of finding an "anomaly", would eliminate PBGC jurisdiction over the instant merger. Such a ruling flies in the face of the statute fixing January 1, 1975 as the effective date of §§ 208 and 1015(1), the merger sections of ERISA.

Significantly, it also departs from clearly expressed congressional intent. Senator Harrison Williams, chairman of the Senate Committee on Labor and Public Welfare, in presenting the conference report, declared that the preemptive substantive provisions of ERISA are to be given a broad interpretation and § 514(b)(1) is to be narrowly construed. Senator Williams stressed:

> that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent state and local regulations of employee benefits plans. This principle is intended to apply in its broadest sense to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law. 1974 U.S. Code Cong. & Admin. News pp. 5188-89.

The lower court's holding giving § 514(b)(1) an expansive construction and a narrow interpretation to the preemptive provisions set forth in § 514(a) stands the statute on its head since it permits the exception, contrary to established law and statutory intent, to totally obliterate the basic preemptive provisions of the statute.

It is not uncommon for disputes involving the validity of a contract to be determined by state law while the ultimate approval of substantive provisions of the agreement is controlled by a federal regulatory statute or a state licensing authority. The fact that a contract requires the approval of a public agency is not a bar to a decree compelling a party to execute the necessary documents for the consummation of a contract or transfer. The decree, however is subject to the ultimate approval of the public agency. *Watson Bros.* v. *Jaffa, supra.* Such is the case in the transfer of ownership of a radio station, interstate trucking routes, or liquor licenses. A dispute respecting the common law enforceability of the contract of sale in such cases will be governed by state law, while the ultimate issue will be

governed by the appropriate regulatory agency. *See, Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120 (1945); *see also, Regents of University System of Georgia,* 338 U.S. 586 (1950); *Watson Bros.* v. *Jaffa, supra; Franko* v. *Olszewski,* 316 Mich. 485, 25 N.W.2d 593 (1947); *In re Fisher,* 98 F. 89 (D.C.Mass. 1899); *Fisher* v. *Cushman,* 103 F. 860, 51 L.R.A. 292 (1900); *In re McArdle,* 126 F. 442 (D.C.Mass. 1903); *In re Becker,* 98 F. 407 (D.C.Pa. 1899); *In re Wiesel,* 173 F. 718 (D.C.Pa. 1909); *In re John F. Doyle,* 209 F. 1 (3rd Cir. 1913); 10 Williston, Contracts (3rd Ed.) § 1134 A, p. 351. Cases cited by petitioners, involving § 514(b)(1), or similar clauses, have held that steps preliminary to effectuation of the transactions may be governed by state law, yet ultimate fruition is governed by the intervening Federal standards. See *Fleming* v. *Rhodes,* 331 U.S. 100 (1947) (judgment for eviction governed by state law; enforcement of judgment and actual eviction governed by intervening Federal prohibition); *Brewing Corp. of America* v. *Cleveland Trust Co.,* 185 F.2d 482 (6th Cir. 1950) (sale and shipment governed by state law, payment governed by intervening Federal prohibition).

The court termed these concepts anomalous. They are nothing of the sort. Actually, in contrast with the Appellate Court's treatment, which destroys significant statutory rights, the views urged here affect a sound accommodation between § 514(b)(1) and the substantive preemptive, protective provisions of the statute.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1821

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL., APPELLANTS

v.

PENSION BENEFIT GUARANTY CORPORATION, ET AL.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 77-0100)

Argued November 1, 1978

Decided January 10, 1979

Judgment entered this date

S. G. Lippman, with whom *Thomas J. Hart* was on the brief, for appellants.

William F. Hanrahan, Attorney, Pension Benefit Guaranty Corporation, with whom *E. Calvin Golumbic*,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Assistant General Counsel, was on the brief, for appellee Pension Benefit Guaranty Corporation.

Bettina B. Plevan, with whom *George G. Gallantz* was on the brief, for appellee Brewery Fund. *David J. Taylor* and *Charles R. Work* also entered appearances for appellee Brewery Fund.

Susan Joan Martin entered an appearance for appellee Brewery Workers Pension Fund and Trustees.

Before J. EDWARD LUMBARD,* *Senior Circuit Judge* for the Second Circuit, and TAMM and LEVENTHAL, *Circuit Judges*.

Opinion for the court filed by *Senior Circuit Judge* LUMBARD.

LUMBARD, *Senior Circuit Judge*: The New York State Teamsters Conference Pension and Retirement Fund ("Teamsters Fund") sued in the district court to compel the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation charged with various administrative responsibilities under the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"), 29 U.S.C. § 1001 *et seq.*, to intervene and disapprove a 1973 merger agreement between the Teamsters Fund and Brewery Workers Pension Fund ("Brewery Fund"). We affirm the order of the district court denying the Teamsters Fund request for declaratory and injunctive relief and granting summary judgment to defendants PBGC and Brewery Fund.

The essential facts are uncontested. The Teamsters Fund and the Brewery Fund are multiemployer defined benefit pension plans within the meaning of §§ 3(2), (35), and (37) of ERISA. A "multiemployer plan" is a pension plan to which no one employer contributes more than 50%

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

of the total yearly contributions and under which benefits are payable to a retired participant even if his employer ceases to make contributions. ERISA § 3(37). In August of 1973 the Teamsters Fund and the Brewery Fund agreed to merge their two funds in order to "minimize the impact upon the funds of possible future declines in employment or other subsequent events affecting any one employer or industry." The merger agreement was made contingent on its approval by participants in the Brewery Fund and on obtainment of a ruling from the Internal Revenue Service that the merged plan would be eligible for favorable tax treatment.[1]

Some six months after the merger agreement was signed, Rheingold Breweries, one of the two largest contributing employers to the Brewery Fund, announced that it intended to terminate its operations. This development made the merger much less attractive to the Teamsters Fund since it dramatically reduced the Brewery Fund's prospective contributions to the joint plan without a proportionate reduction in the joint plan's prospective liabilities to Brewery Fund participants. Consequently, the Teamsters Fund, in February of 1974, citing changed economic circumstances, repudiated the merger agreement and refused to take any further steps to consummate the merger.[2] The Brewery Fund responded several

[1] The merger agreement was ratified by Brewery Fund participants in November of 1973. The necessary tax ruling from the IRS was not obtained until November of 1976, apparently because of the Teamsters Fund's recalcitrance in providing necessary documentation.

[2] The Brewery Fund's already bleak economic condition was made worse when the F&M Schaefer Brewing Corporation closed its New York operations in January of 1976. The Schaefer action, however, was taken well after the Teamsters Fund's decision to repudiate the merger agreement.

months later with a suit for specific performance in New York State Supreme Court. That court, on May 1, 1975, ruled that the merger agreement remained valid and enforceable and ordered the Teamsters Fund specifically to perform its obligations thereunder. The lower court judgment was unanimously affirmed by the Appellate Division, Second Department, in September of 1975, *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 49 A.D.2d 755, 374 N.Y.S.2d 590 (App.Div.2d Dept., 1975), and leave to appeal to the New York Court of Appeals was denied the Teamsters Fund in February of 1976. 38 N.Y.2d 709, 382 N.Y.S.2d 1028, 346 N.E.2d 558 (1976).

In September of 1974, while the Brewery Fund's action for specific performance was pending before the New York courts, Congress enacted ERISA. The Act was designed to protect individual pension rights and established minimum financial and fiduciary standards for private employee benefit plans as well as a system of benefit insurance. Of specific relevance to this proceeding are §§ 208 and 1015(1) of ERISA, parallel provisions that set out pre-conditions for the merger of pension plans within the Act's jurisdiction.[3] In essence, the merger of two pension plans is prohibited unless each participant would be entitled to receive a benefit "immediately after the merger . . . equal to or greater than the benefit he would have been entitled to receive immediately before the merger." ERISA §§ 208 and 1015 (1). That restriction, however, applies "in the case of

[3] § 208 contains the substantive rules governing mergers of private pension plans. Section 1015(1) provides that a trust maintained under a pension plan must abide by the merger rules in order to acquire and maintain favorable tax treatment.

a multiemployer plan only to the extent determined by the PBGC." Id.

Where applicable, ERISA preempts state law concerning employee benefit plans, ERISA § 514(a), and, with exceptions not here relevant, provides for exclusive federal jurisdiction over actions brought under the Act. ERISA § 502(e)(1). Congress made clear, however, that the transition from state to federal regulation was to be gradual by providing that ERISA would not preempt state law with respect to "any cause of action which arose, or any act or omission which occurred before January 1, 1975." ERISA § 514(b)(1). Congress thus ruled out concurrent federal and state regulation[4] but left to the states "what is essentially a clean-up role, . . . the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975." *Azzaro v. Harnett*, 414 F.Supp. 473, 474 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2nd Cir. 1977).

The Teamsters Fund first made its claim that ERISA applied to its merger agreement with the Brewery Fund in March of 1976 when it requested the PBGC to disapprove the merger under §§ 208 and 1015(1) of the Act. By letter dated June 4, 1976, the PBGC declined that request on grounds 1) that the merger agreement

[4] In introducing the conference report on ERISA, Senator Harrison A. Williams Jr., Chairman of the Senate Committee on Labor and Public Welfare, stated:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 1974 U.S. Code Cong. & Admin. News pp. 5188-89.

and the Teamsters Fund's repudiation thereof occurred prior to January 1, 1975 and were thus outside the PBGC's jurisdiction by virtue of the savings provision in § 514(b)(1) of ERISA; and 2) that the PBGC had not yet drafted regulations to make §§ 208 and 1015(1) of the Act operational with respect to multiemployer plans such as the Teamsters Fund and the Brewery Fund.

Following its rebuff from the PBGC, the Teamsters Fund, in January of 1977, filed the instant action in the District Court for the District of Columbia. The Fund sought a declaration that §§ 208 and 1015(1) of ERISA were applicable to its agreement with the Brewery Fund and an injunction directing the PBGC to intervene and assert jurisdiction over the merger. The district court's denial of that relief and its order granting summary judgment for the defendants Brewery Fund and PBGC rested on two legal determinations. The court concluded first that the Teamsters Fund's claims as to the applicability of ERISA were res judicata since they could have been raised as affirmative defenses to the Brewery Fund's state court action for specific performance.[5] In addition, the court ruled that ERISA had no retroactive effect and thus could not be applied where an agreement, and a mature cause of action based thereupon, pre-dated the Act's adoption.[6]

[5] The question of ERISA's applicability to the merger agreement was not raised before the New York State Supreme Court, but apparently was brought to the attention of the Appellate Division. That court's opinion does not address the issue, however.

[6] On this appeal, defendants PBGC and the Brewery Fund urge a third ground in support of the decision below. Since the merger provisions of §§ 208 and 1015(1) of ERISA are expressly made applicable to multiemployer plans such as the Teamsters Fund and the Brewery Fund "only to the extent determined by the PBGC," the defendants contend that the fact that the PBGC has not yet promulgated regulations governing multiemployer plans provides a further reason that ERISA cannot be applied to the merger agreement. Because of our disposition of the other issues presented by this case, there is no need for us to reach this question.

In contending on this appeal that the issues raised by this action are not res judicata, the Teamsters Fund argues that the normal rule barring a party from litigating in federal court claims that were or could have been raised in a prior state court action does not apply to matters with respect to which federal courts have exclusive jurisdiction. Though the Teamsters Fund does not appear to deny that the New York state courts could have entertained, as an affirmative defense, an argument that the Teamsters Fund—Brewery Fund agreement violated the merger provisions of ERISA, it contends that any determination the state courts might have made as to the applicability of the Act would not be entitled to binding effect in a subsequent federal action.

Primary support for the Teamsters Fund's position traces to the Second Circuit's decision in *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, *cert. denied*, 350 U.S. 825 (1955). In that case, plaintiff's treble damage action charged a conspiracy to monopolize trade, a claim that had been raised defensively in a state court contract action. Vacating a stay of the federal anti-trust suit pending final judgment in the state court action, Judge Learned Hand's opinion held that the state court's disposition of the conspiracy claim would not be entitled to collateral estoppel effect since the federal courts' exclusive jurisdiction over treble damage actions "impl[ied] an immunity of their decisions from any prejudgment elsewhere." Id. at 189.

The decision in *Lyons* has received a mixed response from legal commentators, *compare* 1B J. Moore, Federal

Practice § 0.445 at 4113-14 (2d ed. 1974) *with* Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1335, n.20 (1977), and a number of courts have refused to follow it. *See*, e.g., *Azalea Drive-In Theatre, Inc. v. Hanft*, 540 F.2d 713 (4th Cir. 1976). A rule that prevents parties from relitigating claims that could have been or were raised in a prior forum does, in fact, have much to recommend it. At the same time, we note that the strongest case for adherence to the *Lyons* rationale exists in situations where, as is true in the instant case, 1) the party against whom the estoppel is urged did not elect the state court forum, *see*, Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va.L.Rev. 1360, 1365-66 (1967); and 2) the federal claim to which the state court judgment is set up as a bar turns predominantly upon a legal rather than factual determination and involves the interpretation of federal rather than state law.

We need not, however, resolve this difficult question of federal law since we agree with the district court that the federal court lacks subject matter jurisdiction due to the fact that the execution and repudiation of the merger agreement occurred prior to the effective date of ERISA. The Teamsters Fund does not dispute that ERISA's preemption of state law is conditioned by § 514 (b) (1) of the Act which indicates that ERISA does not apply to "any cause of action which arose, or any act or omission which occurred before January 1, 1975." Nor does it deny that the merger agreement and its repudiation thereof predated January 1, 1975. What the Teamsters Fund does contend is that no *cause of action* existed before January 1, 1975, since the merger agreement was made contingent on a favorable IRS ruling

and no such ruling was obtained until November of 1976.[7]

This objection, however, disregards both the character of the merger agreement and the consequences of the Teamsters Fund's repudiation of it. In the first place, not all of the Teamsters Fund's obligations under the merger agreement were contingent on IRS' approval. For example, both parties were expressly obligated to execute "any and all documents necessary to implement" the agreement, which clearly would include the documents needed to support an application for a ruling from the IRS. The Teamsters Fund, however, refused to provide such documentation,[8] and a cause of action to compel its cooperation was obviously not contingent on IRS' approval.

But even assuming that the Teamsters Fund's refusal to assist in preparations for the merger was not a breach of the merger agreement by non-performance, there would be no merit to its argument that the Brewery Fund's cause of action did not arise prior to IRS' approval. Under traditional doctrine, repudiation constitutes a breach of contract even though made in advance

[7] The Teamsters Fund also contends that regardless of whether a cause of action arises prior to January 1, 1975, §§ 208 and 1015(1) of ERISA must be read to prohibit any merger which *occurs* after that date. This argument simply ignores the savings provision in § 514(b)(1) of the Act. The Teamsters Fund offers no explanation as to why Congress would leave to state law causes of action arising before January 1, 1975 but make their enforcement after that date contingent on the provisions of ERISA.

[8] Part of the relief requested by the Brewery Fund, and granted by the New York Supreme Court, was an order directing the Teamsters Fund "to execute those documents that are necessary in order to request approval from the Internal Revenue Service pursuant to the terms of the integration agreement."

of the time performance is due. Restatement (Second) of Contracts § 277(1) (Tent, Draft 1974). The Teamsters Fund's repudiation of its agreement with the Brewery Fund was an anticipatory breach thereof, and effectively eliminated IRS' approval as a pre-condition to a suit by the Brewery Fund to enforce specifically the agreement's terms. *Id.* at § 277, comment b. Indeed, the Teamsters Fund's own legal maneuvering suggests its awareness of this fact. Certainly the Teamsters Fund did not think that its repudiation of the merger agreement in February of 1974, over two years before the necessary IRS ruling was obtained, was an idle step without legal consequence. Rather, because it believed that the merger agreement was unenforceable, the Teamsters Fund sought to test the contract's validity by openly renouncing its terms. Consistent with this intention, the Teamsters Fund's defense to the Brewery Fund's suit for specific performance was that changed economic conditions nullified the agreement, not that the Brewery Fund's suit on the contract was premature.

In sum, a cause of action on behalf of the Brewery Fund to enforce the merger agreement according to its terms was not contingent upon IRS' approval of the merger. To the contrary, the Brewery Fund's cause of action arose at the time of the Teamsters Fund's repudiation and thus is well outside the scope of ERISA by virtue of § 514(b)(1). It should also be recognized that the fact that the Brewery Fund could not have sued prior to the IRS ruling to compel a final merger of the two funds does not alter the conclusion that ERISA cannot apply. To rule otherwise would produce the anomalous result that state law governed the Brewery Fund's cause of action to force the Teamsters Fund to proceed with steps preliminary to the actual merger while the provisions of ERISA controlled any subsequent action to bring the merger to fruition—the exact situa-

tion the preemption and savings provisions of § 514 of ERISA were designed to avoid. By mandating that ERISA would preempt state law and yet leaving to state law the determination of causes of action predating January 1, 1975, Congress sought to provide an orderly transition from state to federal regulation. The result we reach today is consistent with that objective.

Judgment affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0100

NEW YORK STATE TEAMSTERS CONFERENCE
PENSION AND RETIREMENT FUND, *et al., Plaintiffs,*

v.

PENSION BENEFIT GUARANTY CORPORATION, *et al., Defendants.*

Memorandum Opinion

(Filed Aug. 22, 1977)

BARRINGTON D. PARKER, *District Judge:*

This proceeding concerns the effort of the plaintiffs, New York State Teamster Conference and Pension Retirement Fund and its trustees (Teamsters Fund), to void a 1973 merger agreement with the Brewery Workers Pension Fund and its trustees (Brewery Fund). The Teamsters Fund seeks declaratory and injunctive relief against the defendants, the Brewery Fund and the Pension Benefit Guaranty Corporation (PBGC or Corporation). The two funds are multiemployer pension trusts operated by labor unions located in New York State. The PBGC, a government corporation, was established by the Employee Retirement Income Security Act of 1974, (ERISA or Act), 29 U.S.C. § 1001 *et seq.* It serves as an insurer of pension plans covered by the Act and is otherwise responsible for the regulation of voluntary private pension plans.

Jurisdiction is premised upon 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132 and 1303(f).[1] Plaintiff request (1) a declaration that certain restrictive provisions of ERISA are applicable to the merger and require intervention by the PBGC; and (2) an injunction directing the PBGC to make a determination whether the merger will adversely affect the participants and beneficiaries of the merger and thus violate the Act.

[1] While plaintiffs allege jurisdiction based on 5 U.S.C. § 701 *et seq.*, those provisions do not afford an implied grant to district courts of subject matter jurisdiction to review agency decisions. Califano v. Sanders, —— U.S. ——, 97 S.Ct. 980.

There are no material issues of fact, and the parties have filed cross motions for summary judgment. After consideration of the entire record, the Court concludes that the defendants are entitled to summary judgment and that the complaint should be dismissed.

The defendants' motions raise a number of legal issues: that the plaintiffs are barred by the doctrines of *res judicata,* collateral estoppel and laches; that this Court lacks subject matter jurisdiction because the execution and breach of the merger agreement and all claims arising thereunder, occurred prior to ERISA's effective date; and that certain restrictive provisions of the statute preclude PBGC intervention. While these issues are all substantial, the threshold questions concerning *res judicata* and the lack of subject matter jurisdiction are sufficient to defeat plaintiffs' claims for relief.

In August, 1973, the Teamsters Fund and the Brewery Fund entered into a merger agreement. In February, 1974, the Teamsters Fund repudiated the agreement and refused to consummate the merger. Several months later the Brewery Fund sued for specific performance of the agreement in the New York Supreme Court, Queens County. That court entered judgment for the Brewery Fund on May 1, 1975, and (1) declared that the agreement was valid, binding and enforceable between the parties; and (2) directed the Teamsters specifically to perform their obligations thereunder. The lower court judgment was affirmed by the Appellate Division of the New York State Supreme Court in September, 1975; leave to appeal to the New York Court of Appeals was denied on February 10, 1976.

When the New York State Supreme Court action was filed in early 1974, the ERISA legislation relating to pension mergers had not been passed. However, by September, 1974, approximately eight months before the New York court granted summary judgment for the Brewery Fund, federal legislation was enacted. A comprehensive statute, ERISA covers single-employer plans where one employer contributes to the retirement fund as well as multi-employer plans, as here, where more than one employer contributes. The Act establishes minimum standards for vesting and funding of pension plans, standards of fiduciary responsibility, and a system of benefit insurance. In addition, Sections 208 and 1015 of the Act [2] prescribe preconditions for the merger of plans subject to its jurisdiction. Each of these sections has parallel provisions which prevent the merger of two pension plans unless each participant would receive a benefit "immediately after the merger . . . equal to or greater than the benefit he would have been entitled to receive immediately before the merger." They apply, however, "in the case of a multiemployer plan only to the extent determined by the *Pension Benefit Guaranty Corporation.*" (Emphasis added).

The Teamsters Fund contends that the latter provision requires the Corporation to make an individual determination as to whether the Teamsters Fund-Brewery Fund merger violates Sections 208 and 1015. The defendant Brewery Fund asserts, however, that plaintiffs' claims are barred by *res judicata* since the issues now raised in this Court should have and could have been raised in the 1974 proceedings before the New York State Supreme Court.

It is clear that the Teamsters were not barred from asserting as an affirmative defense in the New York proceedings that federal jurisdiction was exclusive and that

[2] Pension plans and merger agreements must be approved by the Internal Revenue Service under applicable sections of the Internal Revenue Code relating to tax deductions and exemptions.

the merger would violate the Act. In that court, as here, the Teamsters sought to avoid the merger because of adverse economic conditions experienced by the Brewery Fund. They did not, however, claim invalidity of the merger because of preemption by a federal statute (ERISA), despite the fact that there is ample New York precedent supporting such a course of action. *Berry Packing v. Packer's Super Markets,* 45 Misc. 2d 40, 41, 255 N.Y.S. 2d 691, 692 (1965); *Remington Rand v. I.B.M.,* 167 Misc. 108, 3 N.Y.S. 2d 515 (1937). In upholding the rights to raise as a defense a claimed violation of the federal antitrust laws, the *Remington Rand* court said:

> [T]he federal laws cannot be used as a basis for affirmative relief in our state courts, since jurisdiction with respect to the enforcement of those laws lies exclusively in the federal courts . . . However, a defense that a cause of action does not lie by reason of a violation of the federal laws is available in an action brought in the courts of this state.

167 Misc. at 115; 3 N.Y.S. at 522.

Likewise, *res judicata* precludes a federal court from asserting jurisdiction over claims which could have been presented in a prior state court proceeding. *Cromwell v. County of Sac.,* 94 U.S. 351 (1877); *Scoggin v. Schrunk,* 522 F.2d 436 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976); *Lovely v. Laliberte,* 498 F.2d 1261 (1st Cir. 1974), *cert. denied,* 419 U.S. 1038 (1974). A party may not "fragment a single cause of action and . . . litigate piecemeal . . . issues which could have been resolved in one action." *Scoggin v. Schrunk,* 522 F.2d at 437.

The 1975 New York State Supreme Court judgment was a decision on the merits and involved both the Teamsters Fund and the Brewery Fund and the same cause of action presented here. Thus, the doctrine of *res judicata* will preclude litigation of "not only . . . every ground of recovery

of defence actually presented in the [New York] action, but also . . . every ground which might have been presented." *Cromwell v. County of Sac.*, 94 U.S. at 353. The Brewery Fund cannot be called upon to relitigate the merger's validity in this Court simply because a new legal theory has been interposed.

There is an added reason why the defendants, and especially the PBGC, must prevail. While it is true that, where applicable, ERISA preempts state and local law governing employee benefit plans and provides exclusive federal jurisdiction, the law has no retroactive effect. It is an accepted rule of statutory construction that absent a clear and unmistakable contrary legislative intent, statutes are not to be given retroactive effect. 2 Sutherland Statutory Construction § 41.04 at 252 (4th ed. 1973). Similarly, the United States Supreme Court has stated that:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'

Greene v. United States, 376 U.S. 149, 160 (1964), *quoting*, *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). Moreover, the legislative history of ERISA and other federal courts that have interpreted the statute indicate that the Act does not apply to events that predate it. *Martin v. Bankers Trust Co.*, 417 F. Supp. 923 (W.D.Va. 1976); *Morowitz v. Bakery Drivers, Local 802 Pension Fund*, 79 Lab. Cas. ¶ 11,602 (E.D.N.Y. 1976); *Nolan v. Meyer*, 520 F.2d 1276, 1278 n.2 (2d Cir. 1975), *cert. denied*, 423 U.S. 1034 (1975).

In the *Martin* case, a former employee who had terminated his employment some three months prior to the passage of ERISA sued under the Act claiming benefits allegedly due from a pension fund. The defendants, the former employer and the trustee and administrator of the fund, sought dismissal of the complaint for lack of subject matter jurisdiction. Ruling in favor of the defendants, the court cited *Greene* for the general rule as to statutory construction and *Nolan* for the rule relating to the construction of ERISA. The court concluded that the plaintiff could not bring the suit since the "cause of action . . . theoretically arose prior to the time the law [ERISA] existed." *Id.* at 925.

Similarly, in *Morowitz*, the widow of a former union member brought suit in a local New York court against a pension fund for benefits allegedly due her individually and as executrix of her late husband's estate. The subject of the suit, whether plaintiff was entitled to the payment of benefits during a preceding 36-month period, was said by the defendant to fall under ERISA, and the case was removed to the federal district court for the Eastern District of New York. That court, upon motion, remanded the case to the New York court stating that "[n]o sound reason . . . [was] apparent for holding that the statute should be retroactively applied to an action fully matured prior to . . . [ERISA's enactment]." *Id.* at 21,602.

Here, the agreement to merge and the Teamsters' breach occurred well before the passage of ERISA. Since a mature cause of action existed prior to the Act's enactment, neither the Court nor the PBGC should interfere at this point.

The defendants are entitled to summary judgment and an appropriate order will be entered.

Dated: August 22, 1977

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

IN THE
Supreme Court of the United States
October Term, 1978

No. 78-1663

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, *ET AL.*,
Petitioners,
v.

PENSION BENEFIT GUARANTY CORPORATION, AND BREWERY WORKERS PENSION FUND, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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TABLE OF CONTENTS

AUTHORITIES CITED

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 591 F.2d 953. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The decision of the court of appeals was issued on January 10, 1979. On February 27, 1979, the court of appeals denied a timely petition for rehearing. The petition for a writ of certiorari was filed on May 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, which supersedes "all State laws" as of January 1, 1975, but does not do so "with respect to any cause of action" arising before that date, controls a dispute over enforcement of a pension fund merger agreement which

(a) was signed in August 1973,

(b) was repudiated in a letter sent in February 1974,

(c) became the subject of a decree of specific performance in litigation in the New York state courts commenced in May 1974,

(d) was initially approved by the Internal Revenue Service in November 1976, and

(e) was further enforced by order of a New York state court in April 1977.

2. Whether the Pension Benefit Guaranty Corporation ("PBGC") has discretion under Section 208 of ERISA, 29 U.S.C. §1058, to defer its regulation of the merger of multiemployer pension plans until it and other interested government agencies have issued regulations interpreting and implementing that provision and others related to it.

STATUTES INVOLVED

Section 208 of ERISA, 29 U.S.C. §1058, provides:

Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corporation.

Section 514 of ERISA, 29 U.S.C. §1144, provides:

Other laws

Supersedures; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to

be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

STATEMENT

Petitioners ("the Teamsters Fund") instituted this action in January 1977 seeking a declaratory judgment that a merger of two multiemployer pension funds, which had been formally agreed upon in August 1973, was unlawful under Sections 208 and 1015(*l*) of the Employee Retirement Income Security Act of 1974 ("ERISA"). Named as defendants in the lawsuit were the Pension Benefit Guaranty Corporation ("PBGC"), the government corporation responsible for administering various aspects of ERISA, and the other party to the merger agreement, the Brewery Workers Pension Fund ("the Brewery Fund"). On cross motions for summary judgment, the district court dismissed the complaint on the grounds (1) that the claim made by petitioners in the federal action could have been asserted by them in litigation over the validity of the merger agreement that had been conducted in the New York state courts between 1974 and 1977 and was, therefore, barred by the doctrine of *res judicata* (Pet. App. 13a-16a), and (2) that ERISA did not apply to this dispute because both the agreement to merge and the Teamsters Fund's breach of that agreement had occurred before the date of ERISA's enactment (Pet. App. 16a-17a). The court of appeals affirmed on the latter ground, citing specifically the language of Section 514(b)(1) of ERISA, which exempts from the clause declaring that "any and all State laws" are to be superseded by ERISA "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." The court of appeals concluded that since the Teamsters Fund repudiated the merger agreement before January 1, 1975, the anticipatory breach gave rise to the "cause of action" defined by Section 514(b)(1) (Pet. App. 8a-11a).

The underlying facts were undisputed and may be briefly summarized:

1. *The merger agreement and its repudiation.*

On August 7, 1973, the Teamsters Fund and the Brewery Fund — both of which were multiemployer pension funds operated and administered in New York — signed an agreement to merge. The agreement provided for the integration of the Brewery Fund into the Teamsters Fund after ratification of the transaction by the employees participating in the Brewery Fund and upon receipt of a favorable determination by the IRS concerning the merger's tax consequences.

The agreement was executed, on behalf of the Teamsters Fund, by all of that Fund's trustees. The Teamsters Fund trustees, like the Brewery Fund trustees, viewed the merger as a means of spreading the risks of uncertain future events — particularly possible declines in future employment or other similar economic events affecting the level of contributions being made to the two funds.

The employees covered by the Brewery Fund approved the merger in November 1973. Shortly thereafter, the owners of the Rheingold Brewery, located in Brooklyn, N.Y., announced that the brewery's operations would be terminated. This meant that one of the two largest sources of prospective contributions on behalf of brewery employees to the joint fund would be removed. The Teamsters Fund trustees then wrote to the Brewery Fund on February 12, 1974, advising that, in light of the changed circumstances, the Teamsters Fund had "decided not to proceed with the proposed integration."[1]

[1]In January 1976 — almost two years after the Teamsters Fund letter repudiating the agreement — the F & M Schaefer Brewing Corporation also closed its New York operations. This prospect was not known to the parties in 1974 and the Teamsters Fund did not rely on it in its letter or in much of the subsequent New York litigation.

2. *Litigation in the New York courts.*

The Brewery Fund sued for specific performance in a New York state court shortly after the merger agreement's repudiation. In September 1974, while the state suit was pending in the trial court, ERISA was enacted. Many of the Act's provisions became effective on January 1, 1975. The Teamsters Fund did not, however, raise ERISA as a defense in any form in the state trial court. It relied solely on the argument that the closing of the Rheingold Brewery constituted a change in economic circumstances excusing performance of the merger agreement.

The state court rejected this defense and granted summary judgment to the Brewery Fund. The court's decree, entered on May 1, 1975, consisted of a declaration that the merger agreement was "a valid agreement and . . . binding and enforcible upon the parties thereto." It also contained an order directing the Teamsters Fund and its trustees to "(i) specifically perform the Integration Agreement and (ii) execute such documents that may be necessary in order to request approval from the Internal Revenue Service pursuant to the provisions of the Integration Agreement."

On appeal from this judgment, the Teamsters Fund first invoked ERISA. Its brief to the New York Appellate Division cited an ERISA provision prohibiting specified transactions by a benefit plan and its trustees (Section 406(b)(2) of the Act, 29 U.S.C. §1106(b)(2) (1976)) and contended that the trustees were "constrained from proceeding to perform the agreement." The Appellate Division summarily affirmed the lower court's judgment. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund,* 49 A.D.2d 755, 374 N.Y.S.2d 590 (App. Div., 2d Dept. 1975). Leave to pursue a further appeal to the New York Court of Appeals was denied on February 10, 1976, 38 N.Y.2d 709, 346 N.E.2d 558, 382 N.Y.S.2d 1028.

3. *Efforts to secure federal intervention.*

After the New York courts had resolved the litigated issues concerning enforceability of the agreement and while proceedings were pending for further enforcement of the merger agreement, the Teamsters Fund attempted to have the PBGC intervene in this dispute. By letters dated March 24, 1976, and April 29, 1976, counsel to the Teamsters Fund requested the PBGC to assert "preemptive authority" over the proposed merger, citing the alleged violation of Sections 208 and 1015 of ERISA.[2] The communications also urged the PBGC to intervene directly in the concluding stages of the New York litigation, referring to "grave apprehension" that Teamsters Fund officials might soon be subject to contempt proceedings for refusing to obey the state court's prior judgment.

4. *The PBGC response.*

In a one-page letter dated June 4, 1976, the PBGC, through its General Counsel, refused to take the measures

[2]Both sections concern mergers and consolidations of benefit plans or transfers of plan assets. Section 208 prohibits a plan from merging, consolidating, or transferring its assets

> unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer (if the plan had then terminated).

Section 1015 denies favorable tax treatment to plans that engage in transactions not meeting this standard. Both of these sections apply to "multiemployer plans," as they are defined in 29 U.S.C. §1002(37), "only to the extent determined by the Pension Benefit Guaranty Corporation." It is not disputed that the Teamsters Fund and Brewery Fund are "multiemployer plans" within the meaning of the Act.

requested by the Teamsters Fund, citing two separate reasons. The pertinent portion of the letter stated:

> We have determined that we cannot take the steps you propose. The Department of Labor and the Internal Revenue Service have not yet issued regulations explicating and implementing §208 with respect to single employer plans. In these circumstances, we have not yet issued regulations determining the extent to which §208 applies to [mergers] with or among multiemployer plans. Consequently, as Mr. Delevett advised you, our position is that §208's limitation on mergers is not yet in effect with respect to multiemployer plans. In any event, §514(a) of the Act, which we assume you believe gives us the "preemptive authority" to which you refer, does ". . . not apply with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975." Act §514(b)(1). The April 16, 1975 court opinion, which you supplied, states that ". . . on February 12, 1974, the trustees of the Teamsters Fund, by letter, informed the trustees of the [Brewery Workers] pension fund that they had voted not to proceed with the proposed integration." It thus appears that the cause of action upon which the State court's decree of specific performance is based arose prior to January 1, 1975. Therefore, in light of §514(b)(1), we do not believe that the Act confers any authority on us to interfere in this matter. For these reasons, we decline to intervene.

5. *Further enforcement of the merger agreement.*

After the refusal of New York's highest court to consider the merits of Teamsters Fund's challenge to the merger agreement, application for a tax ruling was made to the Internal Revenue Service. In November 1976, initial approval

of the merger was obtained from the IRS.[3] Thereafter, the Brewery Fund moved for enforcement of the New York judgment, and, on April 12, 1977, a supplemental order declaring that the merger was to be deemed effective as of December 31, 1976, was issued. A stay pending appeal was denied, and, after its trustees were held in civil contempt, the Teamsters Fund finally merged with the Brewery Fund.

A related class action was also filed on January 11, 1977, in the United States District Court for the Western District of New York. *Cicatello v. Brewery Workers Pension Fund*, 434 F.Supp. 950 (W.D.N.Y. 1977). Brought by alleged representatives of the Teamsters Fund's participants and beneficiaries, the suit sought a declaratory judgment, as well as preliminary and final injunctive relief, prohibiting the merger. Reliance was put on numerous ERISA provisions, of which the foremost was Section 208. A motion to dismiss this suit was granted in June 1977, and the dismissal was affirmed without opinion by the Court of Appeals for the Second Circuit. 578 F.2d 1366 (2d Cir. 1978).

On January 19, 1977, the present action was begun. The district court denied the Teamsters Fund's requests for preliminary injunctive relief against execution of the New York judgment. With both parties filing motions for summary judgment and agreeing that the material facts were not in issue, the district court thereafter granted summary judgment for the PBGC and the Brewery Fund. That decision was affirmed by a unanimous court of appeals.

[3] The petition advises that because of a procedural flaw — failure to give notice to interested parties — the application has been "remanded" to the IRS' regional office (Pet., p. 10). The timing of the IRS approval is, in our view of the case, irrelevant to the issues presented here. Consequently, the present status of the IRS application should not affect this Court's action on the petition.

ARGUMENT

This case concerns an unusual dispute which, on account of its unique facts and its singular timing, presents a question of law that is not likely to recur. The primary legal issue — whether the controversy between the Teamsters and Brewery Funds over the enforceability of their agreement to merge was a "cause of action which arose . . . before January 1, 1975" so as to exempt it from the supersedure provision of ERISA — was correctly decided by the court of appeals. There is no need for further review by this Court. And a subsidiary question — whether the PBGC is empowered by ERISA to defer implementation of its supervisory jurisdiction under Section 208 — presents an alternative ground for sustaining the judgment below. The view expressed in the PBGC's letter of June 4, 1975, is entirely correct, and it is consistent with decisions of this Court.

1. In enacting ERISA, Congress established a comprehensive regulatory scheme for private pension plans. In order to give federal regulation full effect, Congress provided, in Section 514(a) of the Act, for broad preemption of "any and all State laws" in the field, and defined "state laws" in Section 514(c)(1) to cover all conceivable grounds for judicial decision. Congress then fixed January 1, 1975, as the date on which this displacement of state law would take place. Recognizing, however, the potential hardships necessarily accompanying such a wide-ranging change in the legal rules governing pension plans, Congress also provided in Section 514(b)(1) that state law could continue to govern "any cause of action which arose, or any act or omission which occurred, before January 1, 1975."

In keeping with this plain language, the court of appeals properly inquired whether a "cause of action" to enforce the merger agreement between the Teamsters Fund and the Brewery Fund had arisen prior to January 1, 1975. The progress of the litigation in New York's courts was itself

conclusive proof that a "cause of action" had arisen. Hence the courts below were obligated to conclude, as the PBGC had done, that the merger agreement's enforceability would continue to be determined by state law even after ERISA's effective date. To rule otherwise and to have federal law control this pre-1975 dispute simply because the merger could not finally be implemented until after 1975 would render Section 514(b)(1) nugatory. If Congress had intended to supersede state law as of January 1, 1975, irrespective of when a challenger's claim had arisen or when the acts in question took place, the concluding sentence of Section 514(a) would have been sufficient to achieve that objective. Section 514(b)(1) was added so that federal agencies and courts would examine the underlying claim and determine, precisely as they did here, whether the challenge had been ripe for judicial adjudication prior to January 1, 1975. In that case, the dispute must be governed by state law, as the court below properly held.

2. There is no substance to petitioners' contention that the decision of the court of appeals conflicts with rulings of this Court which have applied federal statutes to contracts or other legal arrangements which were concluded before the effective date of the federal laws (Pet., pp. 13-15). Congress plainly has the power to subject to federal regulation all unexecuted pension fund merger agreements, but it simply did not do so in enacting ERISA. It exempted challenges, such as the one made by the Teamsters Fund, which had arisen before January 1, 1975.

The cases cited by petitioners concerned the question whether a legislative body has the constitutional power to enact legislation divesting persons of preexisting contract rights. For instance, in *Fleming v. Rhodes*, 331 U.S. 100, 106 (1947), upon which petitioners place heavy reliance, this Court defined its "sole inquiry" as being whether the lower court's decision "invade[d] the constitutional right of the landlord appellees to retain the fruits of their 'vested

rights' in the valid judgments." Likewise, language quoted by petitioners (Pet., pp. 15-16) from *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467 (1911), is taken from the portion of the Court's opinion which held that Congress could constitutionally pass legislation divesting individuals of a preexisting contract right to free passes on a railroad.

No comparable issue is presented by this case. The question decided below was not whether Congress *could* constitutionally have directed that the enforceability of the merger agreement be determined by reference to ERISA, but rather whether Congress *actually* intended ERISA to govern. The court of appeals resolved this issue by applying statutory language which plainly expressed the legislative intent.[4]

Moreover, the interpretation given to Section 514(b)(1) by the court of appeals in this case is consistent with the view taken by other courts throughout the country. In *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888, 893 (1st Cir. 1978), the Court of Appeals for the First Circuit stated (citations omitted):

> The most natural reading of [§514(b)(1)] is that state substantive law continues to apply to causes of action that arose prior to 1975. Several courts in fact have assumed or suggested that §1144 therefore precludes federal jurisdiction over pre-1975 causes of action.

[4]Nor are petitioners correct in stating that *Fleming v. Rhodes*, 331 U.S. 100 (1974), and *Brewing Corp. of America v. Cleveland Trust Co.*, 185 F.2d 482 (6th Cir. 1950), involved the application of provisions analogous to Section 514(b)(1) to "contexts nearly identical to the case at bar" (Pet., p. 16, n.10). The exemption clause involved in both of these cases was Section 18(3) of the Price Control Extension Act of 1946, which contained no exemption for "causes of action" arising prior to its enactment, and which was held in both cases not to exempt conduct which occurred after the date of the Price Control Act's enactment even if the agreement underlying the transaction was concluded during an exempted period.

And in *Bacon v. Wong*, 445 F.Supp. 1189 (N.D. Cal. 1978), a case cited by petitioners as support for their view of the statute, the district judge explained that "Section 514(b)(1) preserves state law in two situations, when the cause of action arose before January 1, 1975, and when the act or omission occurred before January 1, 1975." He then applied it literally to the California cause of action at issue in that case.[5]

Nor is there substance to petitioners' assertion that the court of appeals' alleged "misapplication" of the doctrine of anticipatory breach warrants review by this Court (Pet., pp. 17-20). Whether or not the Teamsters Fund's February 1974 repudiation of the merger agreement was sufficient to give rise to a "cause of action" in light of the additional precondition that IRS approval be secured is not a question of general importance warranting consideration by this Court. Indeed, it appears to be entirely an issue of New York law, which the New York courts resolved against the Teamsters Fund implicitly when they entertained the action for specific performance and granted relief to the Brewery Fund, and then explicitly in the course of enforcing that judgment. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 62 A.D.2d 1046, 404 N.Y.S.2d 158 (1978).[6]

[5]The other cases cited by petitioners (Pet., p. 16) provide no support for — and in most instances contradict — their interpretation of Section 514(b)(1). This Court's brief observation in *Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978), that "ERISA disclaims any effect with regard to events before [January 1, 1975]," is wholly consistent with the decision below. *Reuther v. Trustees of Trucking Employees Fund*, 575 F.2d 1074, 1078 (3d Cir. 1978), and *Keller v. Graphic Systems of Akron, Inc.*, 422 F.Supp. 1005, 1008 (N.D. Ohio 1976), applied §514(b)(1) literally, as did the court below. See also *Finn v. Chicago Newspaper Publishers' Association - Drivers Union Pension Plan*, 432 F.Supp. 1178 (N.D. Ill. 1977).

[6]This decision is reproduced as Appendix A to this Brief in Opposition, pp. 1a-6a, *infra*.

3. In any event, the ground not reached by the court of appeals (Pet. App. 6a, n. 6) was a proper alternative basis for the PBGC's refusal to grant petitioners' request. Sections 208 and 1015(*l*) of ERISA, on which petitioners rely to invalidate the merger, apply to multiemployer pension plans "only to the extent determined by the Pension Benefit Guaranty Corporation." With this language, Congress deliberately left to the discretion of the PBGC the timing and extent of any regulation of multiemployer plans under Section 208.

On October 29, 1975 — several months before the Teamsters Fund requested PBGC intervention in its dispute with the Brewery Fund — the Department of Labor, the Internal Revenue Service, and the PBGC announced in a public release that Section 208 would not be implemented immediately with regard to multiemployer plans. See Appendix B, pp. 7a-8a, *infra*. This was done because application of the "benefit equivalence test" prescribed by the Act is dependent on the termination insurance program established by Title IV of the Act (29 U.S.C. §4021, *et seq*) and because that test presents complex accounting questions which require substantial evaluation and consideration by experts of the three agencies involved.[7] Hence the PBGC determined, in coordination and after consultation with other responsible government agencies, that it would be unsound to attempt to apply Section 208 to multiemployer plans on a merger-by-merger basis, and that a carefully constructed regulatory foundation should be a prerequisite. The rejection of petitioners' request to in-

[7]Because benefit plans frequently divide participants into separate categories, set varying benefit formulas, and carry their assets in varying forms, the PBGC has already had to issue four detailed regulations on the subject of measuring benefits to which plan participants are entitled upon termination. See 29 C.F.R. §2605 (1975); 41 *Fed. Reg.* 48480 (to be codified as 29 C.F.R. §2608); 41 *Fed. Reg.* 48484 (to be codified as 29 C.F.R. §2610); 29 C.F.R. §2611 (1976).

tervene was a proper application of this policy judgment, which Congress had assigned to the agency.

The precise language of the concluding sentence of Section 208 supports the PBGC's authority to implement such a judgment. Congress did not direct that the statute be applicable generally to mergers of multiemployer plans with only such *exceptions* as the PBGC might specify. Nor did it direct that the PBGC was to evaluate *every* multiemployer merger by this or any other standard. Rather, it assigned the judgment of initiating general rules or particular case-by-case applications to the agency created by the Act, and declared that the statutory formula was to apply "only to the extent" that the agency chose to apply it. This broad statutory delegation gave the PBGC the discretionary power to withhold totally any application of the statutory formula until the general framework for regulation could be resolved among that agency and other interested government bodies. Such a judgment is entirely within the expert agency's delegated powers. See, *e.g., Batterston v. Francis*, 432 U.S. 416, 424-425 (1977); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318-319 (1958).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 5, 1979

APPENDIX A

BREWERY WORKERS PENSION FUND et al., Respondents,

v.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND et al., Appellants.

Supreme Court, Appellate Division, Second Department.

April 24, 1978.

MEMORANDUM BY THE COURT.

In an action for specific performance of an agreement to integrate two pension funds and for a judgment declaring that said agreement is valid and binding, in which action a judgment and order (one paper) was entered in favor of plaintiffs upon the granting of their motion for summary judgment, defendants appeal from an order and supplemental judgment (one paper) of the Supreme Court, Queens County, entered April 12, 1977, which granted plaintiffs' motion to supplement the judgment and order and, *inter alia,* determined that the pension funds have been integrated since December 1, 1976.

Order and supplemental judgment affirmed, with $50 costs and disbursements.

This appeal concerns the efforts of plaintiffs-respondents to enforce an agreement with defendants-appellants, entered into on or about August 7, 1973, whereby the Brewery Workers Pension Fund (Brewery Fund) and the New York State Teamsters Conference Pension and Retirement Fund (Teamsters Fund) were to be integrated. The agreement was to become effective 30 days after the parties were notified of Internal Revenue Service approval, and upon its ratification by a majority of the participating employees.

The brewery workers ratified the agreement in November, 1973. However, in February, 1974, the attorney for the trustees of the Teamsters Fund notified the attorneys for the trustees of the Brewery Fund that, in view of an alleged decline in the number of participating brewery workers, the Teamsters trustees had voted not to proceed with the agreement.

In July, 1974 plaintiffs commenced this action seeking a declaration that the agreement was valid and binding upon the Teamsters trustees, as well as specific performance. The Teamsters trustees defended on the ground of economic hardship.

On September 2, 1974, while this matter was pending, Congress passed the Employee Retirement Income Security Act (ERISA) (U.S. Code, tit. 29, § 1001 et seq.), which, by its terms, was to pre-empt the field as of January 1, 1975 (see ERISA, § 514, subd. [a]; U.S.Code, tit. 29, § 1144, subd. [a]).

Plaintiffs' action proceeded without defendants raising any defense based upon the ERISA. On April 29, 1975 summary judgment was granted in favor of plaintiffs. The agreement was declared valid and binding and specific performance was ordered. On September 29, 1975 this court unanimously affirmed the judgment and order entered thereon (*Brewery Workers Pension Fund v. New York State Teamsters Conference Pension & Retirement Fund*, 49 A.D.2d 755, 374 N.Y.S.2d 590).

Plaintiffs then applied for approval of the Internal Revenue Service, which they received on September 28, 1976. Thereafter, the Brewery Fund trustees attempted to assign the assets of their fund to the Teamsters Fund, in accordance with the agreement. Defendants refused to accept the assignment and, in January, 1977, plaintiffs moved for a supplemental judgment enforcing the previous judgment and order of the Special Term.

It was then that defendants, for the first time, raised the defense that the merger would violate section 208 of the

ERISA (U.S.Code, tit. 29, § 1058) because it would dilute the benefits which participants in the Teamsters Fund would receive.

On January 11, 1977, six days after plaintiffs moved for enforcement, certain beneficiaries and/or participants of the Teamsters Fund commenced a class action in the United States District Court for the Western District of New York against both the Brewery Fund and the Teamsters Fund, alleging, among other things, that the merged plan did not comply with section 208 of the ERISA (see *Cicatello v. Brewery Workers Pension Fund*, D.C., 434 F.Supp. 950).

Meanwhile, defendants had apparently written to the General Counsel of the Pension Benefit Guaranty Corporation (PBGC) asking that the corporation intercede in this matter pursuant to the authority granted it by the ERISA. The PBGC refused on the ground that since it had not yet promulgated regulations determining the extent to which section 208 applied to multi-employer plans, that section did not yet apply to such plans.

In response to that refusal, defendants commenced an action against the PBGC and the Brewery Fund in the United States District Court for the District of Columbia (*New York State Teamsters Conference Pension & Retirement Fund v. Pension Benefit Guaranty Corp.*, No. 77-0100), seeking a declaration that the provisions of the ERISA were applicable and an injunction directing the PBGC to act with respect to the merger.

On April 12, 1977 an order and supplemental judgment granting plaintiffs' motion for enforcement was entered in this action. The Judge indicated that he was bound by the law of the case.

On June 17, 1977 the District Court for the Western District of New York dismissed the complaint in *Cicatello* holding, *inter alia*, in accordance with the PBGC position, that since no regulations had been promulgated with respect to section 208 of the ERISA, that section did not yet apply to multi-employer plans.

On August 22, 1977 the District Court for the District of Columbia granted summary judgment in favor of defendants therein, holding, alternatively, that (1) the Teamsters Fund was barred by the doctrine of *res judicata* from raising the ERISA at the Federal level because it could have and should have raised the issue in the State Supreme Court and (2) since the agreement to merge, the breach by the Teamsters Fund, and the cause of action all occurred or arose prior to the enactment of the ERISA, the court would not interfere because the ERISA could not be applied retroactively.

Finally, on March 14, 1978, the United States Court of Appeals for the Second Circuit afrirmed the judgment of the District Court in *Cicatello*, relying generally on the District Court's opinion, but also noting the ruling of the District Court for the District of Columbia on the Teamsters Fund's challenge to the PBGC's interpretation of section 208.

Defendants argue before this court that the State courts are without jurisdiction because section 502 (subd. [e], par. [1]; U.S.Code, tit. 29, § 1132, subd. [e], par. [1]) of the ERISA provides for exclusive jurisdiction in the United States District Courts over all civil actions brought under Title I of the ERISA by participants and/or beneficiaries of pension plans. We do not agree.

This action was commenced in July, 1974, about two months prior to the enactment of the ERISA, and almost six months prior to its effective date (see ERISA, § 514, subd. [a]). The subsequent enactment of the Federal statute could not oust the State court of jurisdiction. The ERISA itself provides that the pre-emption of Title I does not apply to any cause of action which arose prior to January 1, 1975. The fact that plaintiffs were required to bring a supplemental proceeding to enforce the judgment because of defendants' failure to comply with the earlier decision can mandate no different result. The present application was based upon the same facts as supported the original complaint.

Defendants sought to raise in the Special Term, and seek to raise here, various issues regarding the applicability of the ERISA in general, and section 208 in particular, to the agreement in dispute. However, as plaintiffs correctly point out, defendants are barred from raising those issues by the doctrine of *res judicata*.

The original judgment and order was entered almost four months after the effective date of the ERISA. Consequently, defendants could have raised the ERISA defenses prior to its entry, but inexplicably failed to do so. That judgment and order satisfies all the elements of *res judicata:* a final judgment on the merits, involving the same cause of action and the same parties as are involved in the supplemental proceeding. Accordingly, defendants are barred from further litigating these issues. We note in passing that the District Court for the District of Columbia reached the same conclusion.

Even if the original judgment and order is not entitled to *res judicata* effect, defendants would still be collaterally estopped from raising the ERISA defenses in the enforcement proceeding because of the prior disposition of those defenses at the Federal level. The District Court for the District of Columbia held that the ERISA could not be applied to this agreement because to do so would be to apply the act retroactively without statutory authority. The District Court for the Western District of New York held that section 208 of the ERISA could not be applied to this agreement because of the absence of regulations from the PBGC which are required for its implementation. Consequently, all of the ERISA issues which defendants sought to raise at Special Term have already been decided.

We find without merit defendants' argument that the doctrines of estoppel must yield in this case to a supervening change of law. As we noted, the change in the law occurred at such a time that defendants could have presented their claims in the original action. Defendants have had their day in court.

On this view of the facts, we are not required to reach defendants' remaining contentions, and we do not do so.

APPENDIX B

NEWS RELEASE
PBGC 76-12

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FOR RELEASE: Wednesday, October 29, 1975

THREE AGENCIES ANNOUNCE POSITIONS ON EFFECT OF ERISA ON MERGERS, CONSOLIDATIONS OR TRANSFERS OF ASSETS OR LIABILITIES OF MULTIEMPLOYER PENSION PLANS

The Pension Benefit Guaranty Corporation (PBGC), the Department of Labor (DOL) and the Internal Revenue Service (IRS) jointly announced their positions with respect to the application of Sections 208 and 1015 of the Employee Retirement Income Security Act of 1974 (ERISA), to multiemployer pension plans prior to the time that PBGC makes a determination of the extent to which these Sections will apply to multiemployer plans. These Sections deal with the merger, consolidation, or transfer of assets or liabilities of pension plans.

Section 208 of ERISA provides that a pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of ERISA's enactment unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). A parallel provision is found in Section 414 (1) of the Internal Revenue

Code, added by Section 1015 of ERISA. Section 401 (a)(12) of the Internal Revenue Code, added by Section 1021(b) of ERISA, provides that a trust shall not constitute a qualified trust unless the plan of which it is a part contains a provision to this effect.

Section 208 of ERISA is administered by DOL and Section 1015 of ERISA by IRS. However, the last sentence of each of these Sections authorizes PBGC to determine the extent to which these Sections are to apply to multiemployer plans. PBGC intends to issue a determination of the extent to which Sections 208 and 1015 of ERISA will apply to mergers, consolidations or transfers of assets or liabilities between two or more multiemployer plans or between a single-employer plan and a multiemployer plan, including the withdrawal of an employer from a multiemployer plan where the withdrawing employer establishes a new plan or becomes a contributor to another plan. In the case of such plans, it is the current position of PBGC, DOL and IRS that until PBGC issues a determination dealing with the applicability of these Sections, the restrictions of these Sections are inapplicable, and that when such a determination is issued, its provisions will have only prospective application. However, where a single-employer plan transfers a part of its assets or liabilities to a multiemployer plan, with respect to those employees who remain in the single-employer plan, it is the position of IRS that the provisions of Sections 401(a)(12) and 414(1) apply as of their respective effective dates.

Section 4043(a) and (b)(8) of ERISA require a plan administrator to notify PBGC within 30 days after he knows or has reason to know that there has been a merger, consolidation, or transfer of assets of a defined benefit pension plan covered by Title IV of ERISA. This obligation applies with respect to both single and multiemployer plans and is *not* deferred pending the issuance of a determination by PBGC under Sections 208 and 1015. Consequently, such an occurrence remains a reportable event, which must be reported to PBGC by the plan administrator.

Cm

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1663

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL.,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, AND BREWERY WORKERS PENSION FUND, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents Brewery Workers Pension Fund and its former trustees oppose the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit issued in this case on January 10, 1979.

Question Presented

Whether the Court of Appeals properly applied Section 514(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(b)(1), to the particular facts of this case involving an agreement to merge two multiemployer pension funds, executed and repudiated before January 1, 1975.

Statement of the Case

This is the third court action in which petitioners have sought to avoid their obligation to merge the petitioner New York State Teamsters Conference Pension and Retirement Fund ("Teamsters Fund") with the respondent Brewery Workers Pension Fund ("Brewery Fund") pursuant to an agreement executed in 1973. The proceedings in the New York State courts and the relevant facts of this lawsuit are set forth in the opinions below and will not be repeated here.

The opinion below does not mention that a week before commencement of this suit, Teamsters Fund participants brought an action in the District Court for the Western District of New York seeking to enjoin the merger as violative of ERISA. That action was dismissed for failure to state a claim. *Cicatello* v. *Brewery Workers Pension Fund,* 434 F. Supp. 950 (W.D.N.Y. 1977), *aff'd,* 578 F.2d 1366 (2d Cir. 1978).

REASONS FOR DENYING THE WRIT

I. No Important Federal Question Is Presented In This Case

Petitioners agree with the decision below that ERISA does not preempt state law "with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975," Section 514(b)(1) of ERISA, 29 U.S.C. § 1144(b)(1) (Pet. pp. 16-17). The only question raised by the petition is whether the Court of Appeals erred in applying Section 514(b)(1) to the unique and complex facts of this case, involving a particular agreement to merge two pension funds and protracted litigation over the enforceability of that agreement. ERISA has now been in effect more than four years, and there is therefore no discernible possibility that the decision below will affect other litigants.

The Court of Appeals held that the federal court lacked subject matter jurisdiction over this dispute because of these undisputed facts:

1. The merger agreement was executed before January 1, 1975;

2. Petitioners repudiated the merger agreement before January 1, 1975;

3. The 1974 suit to compel specific performance of the merger agreement was not premature and petitioners never contended that it was; and

4. The New York State court declared the agreement to be "valid, binding and enforceable" and directed petitioners to "specifically perform the agreement."

Petitioners' principal argument, that the pre-ERISA agreement could not have been the subject of a mature cause of action to compel performance before IRS approval of the agreement, was rejected by the court below, which based its decision on settled principles of contract law and the plain language of Section 514(b)(1) as applied to these particular facts.*

The court did not hold, as petitioners state, "that the repudiation of the agreement was an anticipatory breach which eliminated IRS approval as a precondition to the

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* Contrary to petitioners' assertion that IRS approval of the merger was required by law (Pet. p. 19), Treasury Department regulations merely provide a method whereby parties may obtain an advance determination of the continuing qualified status of a pension plan. Treas. Reg. § 601.201(o), 26 C.F.R. § 601.201(o) (1978). Since the merger agreement's provision for IRS approval was purely contractual, cases involving State and federal licensing requirements cited by petitioners (Pet. pp. 20, 23) are both factually and legally irrelevant.

merger." (Pet. p. 18). It merely noted that the Teamsters Fund had refused to assist in seeking IRS approval of the merger agreement and, without reaching the question whether that refusal constituted a waiver of the provision for IRS approval, determined that the Teamsters Fund's anticipatory breach

> "effectively eliminated IRS' approval *as a pre-condition to a suit by the Brewery Fund to enforce specifically the agreement's terms.*" Slip Op. at 10 (emphasis supplied).

That determination raises no important question of federal law. As the court below stated:

> "Under traditional doctrine, repudiation constitutes a breach of contract even though made in advance of the time performance is due." Slip Op. at 9-10.

The New York appellate court also held that a cause of action to enforce the merger agreement arose in February 1974 when petitioners repudiated the agreement and that:

> "The fact that plaintiffs were required to bring a supplemental proceeding to enforce the judgment because of defendants' failure to comply with the earlier decision can mandate no different result. The present application was based upon the same facts as supported the original complaint." *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension & Retirement Fund,* 62 A.D.2d 1046, 1047, 404 N.Y.S.2d 158, 161 (2d Dep't 1978).

The Court of Appeals thus correctly determined that the physical transfer of assets after January 1, 1975, resulting directly from a post-judgment proceeding to hold the Teamsters Fund in contempt, occurred "with respect to [a] cause of action which arose . . . before January 1, 1975." 29 U.S.C. § 1144(b)(1).

II. The Court Below Fully Considered And Correctly Decided The Issue In Accord With The Decisions Of This And Other Courts

The Court of Appeals' application of Section 514(b)(1) of ERISA to the particular facts of this case is consistent with this Court's interpretation of that section in *Malone* v. *White Motor Corp.,* 435 U.S. 497, 499 n.1 (1978):

> "Because ERISA did not become effective until January 1, 1975, and expressly disclaims any effect with regard to events before that date, it does not apply to the facts of this case."

With respect to the specific exemption in Section 514 (b)(1) for pre-existing causes of action, the First Circuit recently stated:

> "The most natural reading of [Section 514(b)(1) of ERISA] is that state substantive law *continues* to apply to causes of action that arose prior to 1975." *Cowan* v. *Keystone Employee Profit Sharing Fund,* 586 F.2d 888, 893 (1st Cir. 1978) (emphasis supplied).

See also Azzaro v. *Harnett,* 414 F. Supp. 473, 475 (S.D.N.Y. 1976), *aff'd,* 553 F.2d 93 (2d Cir.), *cert. denied,* 434 U.S. 824 (1977) (Section 514(b)(1) leaves to the States "what is essentially a cleanup role, . . . the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975"); *Martin* v. *Bankers Trust Co.,* 565 F.2d 1276 (4th Cir. 1977); *Morowitz* v. *Bakery Drivers Local 802 Pension Fund,* 79 Lab. Cas. ¶ 11,602 (E.D.N.Y. 1976).

Other courts, interpreting the "acts or omissions" clause of Section 514(b)(1), have likewise held that ERISA is not applicable to disputes existing prior to January 1, 1975. *Reuther* v. *Trustees of Trucking Employees of Passaic & Bergen County Welfare Fund,* 575 F.2d 1074, 1078 (3rd Cir. 1978); *Nolan* v. *Meyer,* 520 F.2d 1276, 1278 n.2 (2d

Cir.), *cert. denied,* 423 U.S. 1034 (1975); *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005 (N.D. Ohio 1976).

The decision below is also in accord with the legislative history of Section 514(b)(1). Representative Dent, Chairman of the General Subcommittee on Labor and sponsor of the House Pension Bill, stated, with respect to the statute's effect on cases pending in State courts on the effective date of Section 514:

> "—[Mr. Thomson.]—The question is: Will the preemption of State law nullify any *pending litigation* a State may be involved in concerning violations of State law which occurred prior to the preemption?
>
> * * *
>
> "—Mr. Dent.—Mr. Chairman, in reply to the inquiry of the gentleman from Wisconsin (Mr. Thomson) may I say that in my opinion they would be able to proceed with any pending judicial proceeding. So far as I know *we have no retroactivity in any such case.*" II Legislative History of ERISA 3404 (Feb. 26, 1974—House: Floor Debate on H.R. 2 Employee Benefit Security Act) (emphasis supplied).

Petitioners have not demonstrated that the decision below is in conflict with any decision of this Court. Their conclusory assertion that *Fleming* v. *Rhodes,* 331 U.S. 100 (1947), *Louisville & N. R.R.* v. *Mottley,* 219 U.S. 467 (1911) and *Brewing Corp. of America* v. *Cleveland Trust Co.,* 185 F.2d 482 (6th Cir. 1950), each involved "a § 514(b)(1) type clause" and "factual contexts nearly identical to the case at bar" (Pet. p. 16 n.10), is unsupported and incorrect. Neither the statutes involved nor the factual circumstances in those cases are remotely relevant here.

The statute in issue in *Mottley* was Section 6 of the Interstate Commerce Act of February 4, 1887, *as amended by* Act of June 29, 1906, C. 3591 § 2, 34 Stat. 586. That statute contained no savings provision whatever, and this Court noted that Congress had considered "what exceptions, if any, should be made" and resolved the issue "without making any exceptions of *existing contracts,*" 219 U.S. at 479. By contrast, in enacting Section 514(b)(1) of ERISA, Congress expressly precluded application of ERISA to causes of action which arose, or acts or omissions which occurred, before January 1, 1975.

Both *Fleming* and *Brewing Corp.* involved the Price Control Extension Act of 1946, Pub. L. No. 548, 60 Stat. 664 (1946), which re-enacted the Emergency Price Control Act of 1942 after it had expired by its terms on June 30, 1946. In those cases the re-enacted statute was applied to transactions undertaken during the intervening 25-day period but not completed until after the statutory controls had been reinstated. Those situations are hardly analogous to the enactment of the first comprehensive federal statute in an area previously regulated exclusively by the States. *See Malone* v. *White Motor Corp., supra* at 507. (The Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301 *et seq.,* repealed by ERISA "was designed 'to leave to the States the detailed regulations relating to insurance, trusts and other phases of their operations' " (citation omitted).)

The savings provision of the statute involved in *Fleming* and *Brewing Corp.,* Section 18, did not even involve preemption of State law. That section merely provided that, despite the express retroactive effect of the July 25, 1946 re-enactment, no "act or transaction or omission or failure to act" occurring during the twenty-five day period would be deemed a violation of the Act. Section 514(b)(1) of ERISA, on the other hand, not only precludes retroactive effect of the statute but also expressly prohibits prospective application where the dispute involves a cause of action which arose before January 1, 1975.

Accordingly, the lower court's ruling that the objective of "an orderly transition from state to federal regulation"

is accomplished by application of State law to this case is consistent both with the decisions of this and other courts, and with the intent of Congress.

III. The Question Presented By Petitioners Would Not, In Any Event, Be Dispositive

Even if the Court of Appeals had erred in applying Section 514(b)(1) to the facts of this case, the judgment of the District Court could be reversed only if, on remand, the Court of Appeals were to reject the District Court's alternative ground for dismissal, that petitioners' claims were barred by *res judicata*. Moreover, if that were to occur, the case would still have to be remanded to the District Court for consideration of respondents' other contentions that petitioners are barred by laches and that the specific provision of ERISA invoked, Section 208, 29 U.S.C. § 1058, by its own terms does not apply to the type of merger involved in this case. The District Court characterized these issues as "substantial," but found it unnecessary to decide them (Pet. App. B at 13a).

Under such circumstances and in light of the already protracted litigation over an agreement executed six years ago, review of the question presented by petitioners should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Dated: June 25, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1663

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL., *Petitioners*

v.

PENSION BENEFIT GUARANTY CORPORATION, AND BREWERY WORKERS PENSION FUND, ET AL., *Respondents*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Respondent Pension Benefit Guaranty Corporation (PBGC), in its Brief in Opposition, as an alternative basis for supporting the decision of the Court of Appeals, raises the question of the discretionary author-

ity of the PBGC to defer application of § 208 (29 U.S.C. § 1058) to multiemployer plans until such time as it issues regulations of general application. This question, while extensively briefed in the lower courts, was not reached by either of the courts. Nevertheless, a resolution of this question is essential to the ultimate disposition of the case.

Petitioner in this action seeks to compel the PBGC to assert jurisdiction under § 208 and determine whether the merger should be prohibited because of the devastating impact which it would have on the pension benefits of participants of the Teamsters pension fund. The PBGC defends on the ground that § 208 is not yet applicable to multiemployer plans since it has not yet issued regulations determining the extent to which § 208 covers multiemployer plans. Thus, while protection is available to single employer plans under § 208, it may not be invoked to protect employees who are participants in multi-employer plans.[1]

A crucial provision in furthering the Congressional policy of protecting plan participants against loss and diminution of benefits is found in § 208. This section sets forth the minimum standards that must be met before the two funds may merge. The Conference Committee Report accompanying ERISA states that § 208 is to apply to multi-employer plan mergers:

> . . . to the extent the [PBGC] determines those rules are necessary for the participants' protection. S. Rep. 93-1280, 93rd Cong., 2d Sess. p. 385.

Despite the PBGC's responsibility to protect pension plan participants from improvident mergers, the PBGC has not at any time in these proceedings expressed a single concern of the need of applying § 208 to protect the interest of multiemployer plan participants. Rather, PBGC supports its determination that § 208 is inapplicable by relying on the difficulties in promulgating regulations. Pending the issuance of regulations, it contends that § 208 is inapplicable to multiemployer plans. Almost 5 years have elapsed since the enactment of the statute. Regulations have not yet been issued determining the extent to which § 208 is applicable to multiemployer plans.

This court need not and, indeed, should not defer to the PBGC's interpretation of § 208. This court stated in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968):

> . . . the Courts are the final authorities on issues of statutory construction and are not obligated to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or frustrate the congressional policy underlying a statute. (Citation omitted)

See also ***Federal Maritime Commission*** **v.** ***Seatrain Lines***, 411 U.S. 726, 745-746 (1973); ***Morton*** **v.** ***Ruiz***, 415 U.S. 199, 237 (1974); ***Skidmore*** **v.** ***Swift & Co.***,

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[1] There are now about 2,000 private defined benefit multiemployer plans, covering nearly 8 million participants. These plans account for less than 3 percent of all plans covered by the PBGC termination insurance, but contain over 20 percent of all participants in covered plans. Because of their relative size, even a few multiemployer terminations during a given year could have a significant impact on the guaranteed program. Pension Benefit Guaranty Corporation, Multiemployer Study required by P.L. 95-214 (July 1, 1978), page 20.

323 U.S. 134 (1944); and Davis, *Administrative Law* § 5.03, pp. 127-129 (3d Ed. 1972).

The PBGC has no authority to defer the effective date of § 208 to multiemployer plan mergers. Its effort to do so is a blatant violation of the Congressional mandate. The effective date of § 208 is unambiguously set forth in § 208 itself. The section provides that no merger or transfer of funds may take place after "enactment of this Act" without satisfying the § 208 standard. The Conference Report is similarly unambiguous. The report states:

> In the case of multiemployer plans, these rules [§ 208 test] are to apply only to the extent that the [PBGC] determines that these rules are necessary for the participant's protection. These rules are to apply to mergers or transfers made after the date of enactment of the bill, but the plan provision to this effect does not have to be adopted prior to January 1, 1976. S. Rep. 93-1280, 93d Cong., 2d Sess., p. 385.

The Conference Report also makes clear that the PBGC would have authority to defer application only upon a determination that "these rules are necessary for the participant's protection". No such determination has been made here. Instead PBGC, without any statutory authority, has deferred application of § 208 to multiemployer plans until such time as it becomes administratively feasible to issue regulations on the subject.

The legislative history reveals that neither the bills in the House or the Senate distinguished between single and multiemployer plans. The House bill, however, contained a provision deferring multiemployer plans for a period of up to 7 years. H.R. 2, 93rd Cong., 1st

Sess. (October 2, 1973) and H.R. 12855, 93rd Cong., 2d Sess. (February 19, 1974). The Senate bill did not contain a similar provision, and the House provision was rejected in conference in favor of the present provision that the PBGC would have authority to defer application only upon a determination that application of § 208 would not be necessary for protection of plan participants. Nevertheless, the PBGC in the Court of Appeals, relied on the House bill for its authority to defer application of § 208 to multiemployer plans. Plainly, reliance upon a rejected version of legislation is hardly sufficient to alter an unambiguous statutory provision. *Gulf Oil Corp.* v. *Copp Paving Co., Inc.,* 419 U.S. 186 (1974); *National Automatic Laundry and Cleaning Council* v. *Shultz,* 443 F. 2d 689 at 706 (D.C. Cir. 1971); and *Bethlehem Steel Corp.* v. *Train,* 544 F. 2d 657 (3d Cir. 1976), *cert. den.,* 430 U.S. 975 (1977).

In *Connolly* v. *PBGC,* 581 F. 2d 729, 734 (9th Cir. 1978) the court discussed the applicability of ERISA to multiemployer plans. In support of its conclusion, the court, citing the legislative history, stated:

> The conferees had no intention whatsoever of treating workers in these [multiemployer] plans as "second class citizens" and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved.

The PBGC urges that it would administratively infeasible to apply § 208 since the benefit equivalency test of § 208 requires application of other provisions of the statute which have not yet been defined. Specifically, the PBGC asserts that before the benefit equivalency test can become applicable, it is necessary to promulgate other regulations relating to the termi-

nation insurance program, which requires substantial evaluations by experts of three agencies. Thus, it is urged that the complexity of the regulatory problems supports the denial of the protection of the Act.

The PBGC does not claim that there is any special difficulty in applying the benefit equivalency test to the instant merger since it is undisputed that the merger here would effect a substantial reduction in benefits and impose on the fund a liability in excess of $70 million. PBGC's contentions are apparently addressed to alleged difficulties in seeking to promulgate regulations covering the entire category of multiemployer plans, and not to a determination of the need to extend § 208 protection to the Teamster fund participants in this case.

The PBGC's argument is inherently suspect, since numerous ERISA statutory events require application of the same alleged complex provisions urged here as justifying deferring application of § 208 to multiemployer plans. Statutory events, such as the merger of a single employer plan (governed by § 208), terminations (governed by § 4041 (29 U.S.C. § 1341)), and assessment of employer liability upon termination (§ 4062 (29 U.S.C. § 1362)), all require that a plan be treated as terminated and that the available benefits be determined after application of § 4022 (guaranteed benefits, 29 U.S.C. § 1322) and § 4044 (allocation of assets, 29 U.S.C. § 1344). Yet, each of these provisions of Title IV became immediately applicable upon ERISA's enactment (§ 4082 (29 U.S.C. § 1382)) and have not been deferred.

The PBGC may not hold § 208 in abeyance until it issues regulations nor may it apply § 208 in such a

way as to apply a blanket rule of inapplicability to multiemployer plans by asserting a plea of administrative infeasibility. *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655 (1973); *NRDC, Inc.* v. *Costle* [Feedlots case], 568 F. 2d 1369 (D.C. Cir. 1977); *Federal Land Bank Assn. of Asheville* v. *Commissioner of Internal Revenue,* 573 F. 2d 179 (4th Cir. 1978). In a review of the foregoing cases, the following principles are clear: (1) since the operation of § 208 is not expressly conditioned upon a formal regulatory scheme by the PBGC and the PBGC has only permissive authority to issue regulations and criteria, the operation of § 208 prohibitions cannot be held in abeyance until such time, if ever, as the PBGC issues regulations (*Pennsylvania Chemical, supra.*); (2) although the PBGC may have authority to determine the *extent* to which § 208's prohibitions are to apply to multiemployer plans, it *may not* seek to exempt the entire category of multiemployer plans from the substantive requirements of § 208 because of administrative infeasibility (*Feedlots, supra.*); and (3) since § 208 is cast in permissive terms respecting PBGC authority, the PBGC may not invoke a blanket rule of nonapplicability to multiemployer plans since this would convert § 208 into a mandatory statute excluding multiemployer plan mergers from coverage without any analysis or determination whatsoever as to whether application of § 208 was necessary to achieve the Act's purpose (*Federal Land Bank Assn., supra.*). In short, whatever discretion may be vested in the PBGC concerning the application of § 208 to a particular merger, the agency clearly does not have discretionary authority to ignore the statute and read the term multiemployer plans out of the Act.

The full implication of the PBGC refusal to apply § 208 to multiemployer mergers is manifest in the 1978 report which the PBGC submitted to Congress, *supra*. In this report the PBGC, in urging amendments to the multiemployer provisions of ERISA, stated with respect to § 208, that its application to multiemployer plans is "administratively unworkable", *supra* at page 120. Indeed, PBGC has made no effort to apply § 208 to multiemployer plans even in the most patent situation, requiring the application of § 208. This report, reflecting the action of the PBGC in this case, makes plain that the PBGC, without statutory authority, has administratively deleted multiemployer plan coverage from the protection afforded by § 208.

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